No. 16178

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ANTHONY CELLINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

RULES

STATUTES

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APPELLEE'S BRIEF.

I.
STATEMENT OF JURISDICTION.

A. The jurisdiction of the Court of Appeals to review the judgment of the District Court herein is conferred by Title 28, United States Code, Section 1291.

B. The jurisdiction of the District Court herein is conferred by Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174.

C. The existence of jurisdiction in the District Court is shown by the allegations of the Indictment that the defendant Frank Anthony Cellino did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug which he knew had been imported into the United States contrary to law.

D. The final judgment from which this appeal is taken was entered on March 10, 1958. The defendant served and filed his notice of appeal therefrom on March 21, 1958.

II.
STATEMENT OF THE CASE.

A. Factual Statement.

On October 10, 1957, appellant was contacted by Los Angeles County Deputy Sheriff Ray Velasquez, acting as an undercover agent, through Bobby Ulrey [Rep. Tr. 35]. Ulrey stated that he would like to "pick up," *i.e.,* obtain some heroin. [Rep. Tr. 35.] Appellant said he did not have any "stuff", *i.e.,* heroin, but would take Mr. Ulrey and Deputy Velasquez to the man that did [Rep. Tr. 35]. Appellant directed the officer and Mr. Ulrey to get into Deputy Velasquez' automobile, and the appellant told Deputy Velasquez to drive to Mission and Narva Streets [Rep. Tr. 35]. When the appellant and the other two arrived at the place to which the appellant had directed them, the latter left them, saying "You guys wait here" [Rep. Tr. 35]. Immediately thereafter Velasquez and Ulrey were approached by the appellant's co-defendant, Joe Bruno, whose first words to Velasquez and Ulrey were: "How much do you guys want to pick up?" [Rep. Tr. 35]. Velasquez said he wanted an ounce of heroin and immediately Bruno and Velasquez negotiated the price of the sale [Rep. Tr. 36-37]. Velasquez paid Bruno $100 in Federal advance funds, and further machinations called for Velasquez and Ulrey entering a drug store on Workman Street [Rep. Tr. 40-41]. The appellant was seated in the drug store when Velasquez and Ulrey entered [Rep. Tr. 41]. In response to the comment made by Velasquez that he hoped Bruno wouldn't "burn" him, *i.e.,* go away with the money and not supply narcotics or give some substance in lieu of narcotics, appellant replied that Bruno was a good man who doesn't do those kind of things, and was sure that

Bruno would return with the narcotics [Rep. Tr. 41]. Bruno did return, and gave a quantity of heroin to Velasquez in the presence of Ulrey and the appellant [Rep. Tr. 42, 16, 17].

The jury convicted appellant Cellino for selling and facilitating the sale of a quantity of heroin [Rep. Tr. 219].

B. Procedural Statement.

The Indictment charged in one count that appellant sold and facilitated the sale of a quantity of heroin on or about October 10, 1957 [Rep. Tr. 210]. Appellant's motion for acquittal at the end of the Government's case was denied [Rep. Tr. 144]. Such motion was not renewed at the end of all the evidence [Rep. Tr. 194].

III.

SUMMARY OF THE ARGUMENT.

A. Unless a motion for acquittal is made at the end of all of the evidence, the question of the sufficiency of the evidence is not open to review on appeal; in any event, the evidence sustained the verdict of the jury.

B. The evidence of the imported nature of the narcotics with respect to which the appellant was convicted, and the appellant's knowledge of that importation, was sufficient to sustain the verdict of the jury and the judgment pronounced thereon.

1. The statute violated by the appellant provides for evidence of the illegal importation of heroin, and the appellant's knowledge of such importation, by virtue of a presumption contained therein.

2. The possession required to bring the statutory presumption contained in Title 21, United States Code, Section 174 into operation need not be that of the person convicted as a result of that operation.

C. The conduct of the United States Attorney was in no manner improper, and in any event the conduct of the prosecuting attorney resulted in no prejudice to the appellant.

D. The issue of entrapment cannot be raised for the first time on appeal.

IV.
ARGUMENT.

A. Unless a Motion for Acquittal Is Made at the End of All the Evidence, the Question of the Sufficiency of the Evidence Is Not Open to Review on Appeal.

In an argument entitled "No Jurisdictional Basis of the United States Court", the appellant is urging this Court to reverse a judgment of conviction rendered in the United States District Court for the Southern District of California on the grounds that such Court lacked jurisdiction to render the judgment or impose sentence thereon. Appellant does not urge that the District Court did not have jurisdiction over the person of the appellant, since the record of the trial indicates his presence in court [Rep. Tr. 4]; nor does the appellant urge that the District Court lacks subject matter jurisdiction over the offense charged against the appellant, since the Supreme Court of the United States, in *Brolin v. United States,* 236 U. S. 216 (1915) points out that the power of the Federal Government to punish narcotics offenses in the Courts of the United States is based upon the power delegated to Congress by the Constitution to regulate interstate and foreign commerce. *United States v. Ah Hung,* 243 Fed. 762 (2d Cir. 1917) further provides that no matter how far removed one is from the importation as-

pect, the United States Courts still retain the jurisdiction granted them by the Commerce Clause of the Constitution of the United States. Therefore, when the appellant argues that there is no jurisdiction in the District Court, he is arguing that jurisdictional facts were not proven, that no importation of narcotics was shown as it related to the appellant, that the evidence was insufficient to support the verdict.

Before the appellant can ask this Court to review the judgment and sentence of the District Court on the grounds of insufficiency of the evidence, he must preserve this basis by appropriate motion in the trial Court. Rule 29(a) of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

> ". . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

In the instant case, a motion for acquittal was made by the appellant at the termination of the Government's case [Rep. Tr. 144]. Such motion was denied after oral argument [Rep. Tr. 151]. Thereafter the appellant put on evidence, and did not renew his motion for acquittal at the termination of all of the evidence [Rep. Tr. 194]. By offering evidence after a motion for acquittal has been

denied, the appellant waived the right to have the sufficiency of the evidence considered on appeal.

Mosca v. United States, 174 F. 2d 448 (9th Cir. 1949);

Maulding v. United States, 257 F. 2d 56 (9th Cir. 1958);

Paine v. United States, 7 F. 2d 263 (9th Cir. 1925);

Mitchell v. United States, 23 F. 2d 260 (9th Cir. 1927).

The Eighth Circuit, in addressing itself to this point, spoke in apposite language in *Leeby v. United States,* 192 F. 2d 331 (8th Cir. 1951) at page 333:

> "We shall first refer to the claim of error in denying defendant's motion for acquittal interposed at the close of the government's case. It is observed that after this motion was interposed and denied at the close of the government's case, defendant offered testimony and himself testified in his own behalf. He did not renew this motion at the close of all the evidence. Defendant was entitled to offer evidence in his defense notwithstanding the fact that he had interposed a motion for acquittal at the close of the government's testimony but by so doing he waived his objection to the ruling of the court in denying his motion and his right to allege this ruling as error, and defendant not having interposed a motion for judgment of acquittal at the close of all the testimony, we cannot now consider the question of the sufficiency of the evidence to sustain the judgment and sentence of conviction."

The Government is not unmindful of Rule 52(b) of the Federal Rules of Criminal Procedure, and such decisions as *Alberty v. United States,* 91 F. 2d 461 (9th Cir. 1937) and *Bruno v. United States,* 259 F. 2d 8 (9th Cir. 1958) wherein this Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a manifest injustice, but feels that no injustice here would result, and hence the reasoning of *United States v. Mosca, supra,* and the cases in line with it, is applicable.

And in any event, the evidence was sufficient to support the judgment and sentence. Ulrey told the defendant that he would like to "pick up", *i.e.,* obtain heroin [Rep. Tr. 35]. The appellant stated that he didn't have any "stuff", *i.e.,* heroin, but would take Ulrey and Velasquez to the man that did [Rep. Tr. 35]. Thereafter the appellant directed the activities of Velasquez and Ulrey, and accompanied them to a spot where a liaison could be made with a person who had heroin to sell [Rep. Tr. 35]. The appellant directed Velasquez and Ulrey to wait and left them [Rep. Tr. 35]. Immediately thereafter Bruno appeared on the scene and his first words, upon coming upon Velasquez and Ulrey were "How much do you guys want to pick up?" [Rep. Tr. 35]. From these facts the jury could infer that the appellant found willing buyers for heroin, brought the buyers to a given place, accompanied them to that place, directed them to wait, sought out the seller, and informed him where buyers for heroin could be located. Further, appellant's presence at the time the heroin was being delivered, knowing that that delivery was taking place, further emphasizes his participation in the transaction which led to his conviction.

B. The Evidence of the Imported Nature of the Heroin With Respect to Which the Appellant Was Convicted, and the Appellant's Knowledge of That Importation, Was Sufficient to Sustain the Verdict of the Jury and the Judgment Pronounced Thereon.

1. The Statute Violated by the Appellant Provides for Evidence of the Illegal Importation of Heroin, and the Appellant's Knowledge of Such Importation, by Virtue of a Presumption Contained Therein.

The appellant contends that the judgment of the Court below should be reversed because the heroin in connection with which the appellant was convicted was not shown to have been imported at all, much less illegally, nor was a showing made that the appellant knew such narcotics to have been imported. With respect to this contention, it becomes necessary to look to the language of the statute here violated. Section 174 of Title 18 of the United States Code reads in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be

deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Thus it can be seen that the words ". . . possession shall be deemed sufficient evidence to authorize conviction . . ." provides the necessary proof not only of the illegal importation of the heroin here in question, but also the appellant's knowledge of that importation.

Yee Hem v. United States, 268 U. S. 178 (1925).

The statutory presumption that heroin was illegally imported and that the person in possession of such heroin knew of the illegal importation has been repeatedly sustained.

Hooper v. United States, 16 F. 2d 868 (9th Cir. 1926);

Stopelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. den. 340 U. S. 864;

United States v. Moe Liss, 105 F. 2d 144 (2d Cir. 1939);

United States v. Feinberg, 123 F. 2d 425 (7th Cir. 1941), cert. den. 315 U. S. 801;

Howard v. United States, 75 F. 2d 562, (7th Cir. 1935);

Frank v. United States, 37 F. 2d 77 (8th Cir. 1929).

2. The "Possession" Required to Bring the Statutory Presumption Contained in Title 21, United States Code, Section 174 Into Operation Need Not Be That of the Person Convicted as a Result of That Operation.

Appellant concedes the validity of the statutory presumption contained in 21 United States Code, Section 174 as it applies to his co-defendant, Joe Bruno, but takes the position that such presumption should not flow to him because he was never shown to have been in possession of the heroin in question. However the weakness in appellant's position can be found by reference to Title 18, United States Code, Section 2, which reads:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The Courts of the Second and Seventh Circuits have addressed themselves to the issue of the "possession" required of an aider and abettor to invoke the statutory presumption contained in 21 United States Code, Section 174. In *United States v. Cohen,* 124 F. 2d 164 (2d Cir. 1941), cert. den. 315 U. S. 811, the Court said:

> "Under the first statute we have quoted [21 U. S. C. 174] it was only necessary to show possession of the narcotics to establish guilt and under the second statute [18 U. S. C. 2], making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental."

This language was quoted with approval by the Court in *United States v. Chiarelli,* 192 F. 2d 528 (7th Cir.

1951), cert. den. 342 U. S. 913. The record of the court below indicates clearly that appellant's co-defendant, Joe Bruno, was in possession of heroin incident to a transaction the consummation of which the appellant aided and abetted, [Rep. Tr. 16, 17, 35, 41, 42]. In this regard one may be charged in an indictment as a principal and convicted as an aider and abettor, as this Court has held in *Nye and Nisson v. United States,* 168 F. 2d 846 (9th Cir. 1948), affirmed 336 U. S. 613.

There is a further difficulty with the appellant's contention that the judgment of the trial court should be reversed because the appellant was not shown to have been in possession of the heroin in question. This difficulty arises from the nature of the indictment, which charges that the appellant and his co-defendant, Joe Bruno:

> ". . . after importation, did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely: approximately 83 grains of heroin, to Ray Velasquez, which said heroin, as the defendants then and there well knew, had been imported into the United States contrary to law."

Thus it can be seen that the appellant is charged with selling and *facilitating the sale* of the charged quantity of heroin.

In construing the meaning of the term "facilitate" as used in Title 21, United States Code, Section 174, this court has said on *Pon Wing Quong v. United States,* 111 F. 2d 751 (9th Cir. 1940) at page 756:

> "Since the term 'facilitate' seems not to have any special legal meaning, the framers of this statute must have had in mind the common and ordinary

> definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

This Court has further stated, in *Brown v. United States,* 222 F. 2d 293 (9th Cir. 1955) that one need not have possession of heroin in order that he be convicted of facilitating the sale of that heroin.

In support of his contention with respect to the fact that the statutory presumption ought not to be applicable to the appellant since he was never shown to have been in possession of heroin, he relies heavily on *Willsman v. United States,* 286 Fed. 852 (8th Cir. 1923). He also relies on *Kalos v. United States,* 9 F. 2d 268 (8th Cir. 1925) and *Adams v. United States,* 220 F. 2d 297 (5th Cir. 1955).

The *Willsman* case dealt with a prosecution for the purchase by Willsman and his co-defendant Grant of a quantity of morphine sulphate otherwise than from the original stamped package containing the same. There was a statutory presumption in point in the *Willsman* case which read:

> ". . . the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found."

In construing the above quoted section of the Harrison Anti-Narcotic Act, the court held, under the facts of that case, that possession by a co-defendant was insufficient to raise the statutory presumption quoted above. However, the statutory presumption applicable to the appel-

lant is entirely different, and hence the *Willsman* case provides no precedent in the construction of the statutory presumption contained in 21 United States Code, Section 174. This is further shown by looking to certain language in the *Willsman* case itself, where it was said at page 855:

> "If the matter before us was upon an indictment charging an unlawful sale by the defendants, the evidence would undoubtedly tend to show Grant to be a principal in fact, and Willsman a principal in law, because aiding and abetting in the sale; but the section of the statute making an abettor a principal has no application to the matter now under consideration."

Thus it can be seen that under the authority relied on by the appellant, appellant charged with the sale of heroin, would be liable as an aider and abettor.

Appellant also relies on *Kalos v. United States,* 9 F. 2d 268 (8th Cir. 1925) to the effect that the Government must prove knowledge of unlawful importation. The case of *Frank v. United States,* 37 F. 2d 77 (8th Cir. 1929), in construing the effect of the *Kalos* case, indicated that the *Kalos* case held as it did because possession with the knowledge on the part of the defendant that the substance possessed was a narcotic drug was not proved, and hence the effect of the presumption contained in 21 U. S. C. 174 was not discussed in the *Kalos* case.

The appellant cites *Adams v. United States,* 220 F. 2d 297 (5th Cir. 1955). That case dealt with whether or not there was proof that the defendant sold heroin, since the indictment in the *Adams* case did not charge that the defendant facilitated the sale of heroin, only that the de-

fendant sold heroin. Here, where the allegations of the indictment show a facilitation of sale rather than a sale, the *Adams* case does not support the appellant's position.

C. The Conduct of the United States Attorney Was in No Manner Improper, and in Any Event the Conduct of the Prosecuting Attorney Resulted in No Prejudice to the Appellant.

Appellant contends that the United States Attorney asked improper questions calculated to inflame and prejudice the jury. He admits the United States had the right to show to the jury that the appellant had committed a felony in the past, since this went to impeach his credibility as a witness. However, appellant alleges that United States Attorney went further than this, that he insisted the appellant tell the jury where he met Bobby Ulrey, to wit, San Quentin prison. With respect to the questions regarding where the defendant had met Ulrey, it may be noted that these were received into evidence without objection on the part of the appellant. The only objection raised on the subject of inquiry into appellant's prior incarceration in San Quentin prison was an objection to the question how long has it been since appellant had been in San Quentin. Which was overruled. Since the relationship between appellant and Mr. Ulrey was in issue and since United States had the right to show the appellant had been convicted of a felony prior to the time of this indictment was brought against him, it is submitted that there is no error in allowing the testimony with respect to the prior incarceration in San Quentin to come into evidence. *Morgan v. United States,* 98 F. 2d 473 (8th Cir. 1938), cert. denied 305 U. S. 648, reh. denied 305 U. S. 674; *Vedin v. McConnell,* 22 F. 2d 753 (9th Cir. 1927).

It is also argued by appellant that there was prejudicial misconduct on the part of the United States Attorney when he asked "what were the circumstances involved in this assault with a deadly weapon" following an admission of another prior felony conviction. To this question the appellant objected and the objection was sustained, so that no details of the offense were put before the jury. However, appellant did not ask for a charge that the jury disregard the question, nor did appellant make a motion for a mistrial. He chose rather to gamble on the verdict, and since it was not favorable to him, he now raises the issue of misconduct. Without a motion for a mistrial an appeal based upon misconduct is waived. *Jenkins v. United States,* 251 F. 2d 51 (5th Cir. 1958). To the same effect is the case of *Harris v. United States,* 261 F. 2d 897 (9th Cir. 1959), which case said at page 902:

> "In *Alberty v. United States,* 9 Cir., 1937, 91 F. 2d 461, 463, the assignments of error raised questions as to the propriety of Government counsel's conduct. The Court stated at Page 463: 'Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there is none in claiming it against the prosecutor. It should be made at once. The Court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the Court and jury, in an extended trial and, without objection or motion for relief, raise such questions on appeal.' The same view was expressed in *Powell v. United States,* 9 Cir. 1929, 35 F. 2d 941."

Further this Court has held in *Kasper v. United States,* 225 F. 2d 275 (9th Cir. 1955) that the asking of improper questions by the prosecuting attorney does not necessarily affect the fairness of the trial.

D. The Issue of Entrapment Cannot Be Raised for the First Time on Appeal.

Appellant next asserts that any evidence introduced by the United States from testimony given by Deputy Velasquez was illegally obtained because Deputy Velasquez had induced the entire transaction. What appellant is really trying to do here is to raise the issue of entrapment for the first time on appeal. Although couching his argument in the terms of illegally obtained evidence he argues in his opening brief that the transportation of the appellant from the point where Ulrey and Velasquez first met appellant to the point where Ulrey and Velasquez met the co-defendant Bruno was induced by Deputy Sheriff Velasquez and that without this all-important transportation of the appellant by the witness for the United States there would have been no crime. He argues that this vital element was done by the agent of the United States contrary to law and established cases, where the United States agent acted illegally the evidence so obtained is illegal and inadmissible. This argument merely attempts to put before this Court the issue of entrapment. This issue was not before the trial court, no instructions were given on the issue of entrapment, none were requested by this appellant, and no objectiion was raised to the fact that no entrapment instructions were given. According to *United States v. Ginsburg,* 96 F. 2d 882 (7th Cir. 1938), cert. denied 305 U. S. 620, no issue of entrapment can be raised if no instructions were requested on entrapment or no objection raised to the fact that entrapment instructions were not given.

However, if this Court wishes to consider the point, its lack of substance is readily apparent. *Sorrells v. United States,* 287 U. S. 435 (1932) remains the leading case on the subject of entrapment, stating that artifice and stratagem may be employed to catch those engaged in criminal enterprises, that if the crime begins in the mind of the defendant, not in the mind of the agents of the United States, there is no entrapment. Further the *Sorrells* case shows that if a defendant seeks acquittal on the basis that he was entrapped into the commission of crime he must subject himself into a searching inquiry into his own conduct and pre-dispositions, toward the commission of the crime charged, since entrapment is a question of fact for the jury. In the case at bar, since no claim was made at the trial that the defendant was entrapped into the commission of the offense for which he was convicted, there was no opportunity to investigate the background of the defendant in order to see whether or not he was predisposed to commit the crime, or whether or not the crime originated in his mind or in the mind of those charged with the enforcement of Federal laws. This Court has said in *Trice v. United States,* 211 F. 2d 513 (9th Cir. 1954) at page 516:

> "The people's fight through the Government against the use of narcotics is a desperate and continuous one. So great is the menace that the hiring of disreputable persons to act with the narcotics agent in deceit and by despicable methods to catch distributors of the 'stuff' has been sanctioned by the highest Courts as the only successful manner to combat the evil . . .
>
> "Here is entrapment in fact . . . the question is: Is it illegal entrapment and the answer to that ques-

tion is to be found in the testimony of the narcotics agents on whether they had reasonable grounds to believe that Trice was predisposed to engage in the illicit traffic."

Since the issue of entrapment was not raised below there was no inquiry as to whether or not the narcotics agents had reasonable grounds to believe that appellant was predisposed to engage in the illicit sale of narcotics. Therefore the point cannot now be urged for the first time that as to this appellant the Government engaged in illegal activities in order to secure his arrest.

United States v. Ginsburg, supra.

V.

CONCLUSION.

1. The appellant, by failing to make a motion for acquittal at the end of all of the evidence, has waived the right to assert the insufficiency of the evidence of jurisdictional facts.

2. It is clear that the appellant aided and abetted, and facilitated the sale of heroin by the co-defendant Bruno to Deputy Velasquez. Since possession was proved as to Bruno, the consequences of such possession flow to the appellant who aided and abetted, and facilitated the transaction to which that possession was incidental.

3. The conduct of the prosecuting attorney was proper, and if the appellant had wished to preserve any alleged improprieties for review, he should have requested a charge that the jury disregard the questions, or move for a mistrial.

4. There is no showing that the defendant was entrapped. Further, the issue of entrapment was never placed before the jury. Therefore the Government respectfully requests that the judgment of conviction of the trial court be affirmed.

Respectfully submitted,

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